Re Chor Saw Oon; ex p Tan Jiak Chye

HIGH COURT (PULAU PINANG) — BANKRUPTCY NO 29–452 OF 1994
JEFFREY TAN J
7 JUNE 1999

Bankruptcy *— Petition — Stay — Leave to appeal granted — Sum deposited with assistant official assignee — Matters to be considered before grant of stay — Whether stay should be granted*

The judgment debtor applied to stay all proceedings under the bankruptcy petition until the disposal of the judgment debtor's ('the JD') motion for leave to appeal to the Federal Court against the whole of the decision of the Court of Appeal.

Held, allowing the application:
In deciding whether to grant a stay, the court has to balance the repercussions and the court has to have regard to all the circumstances of the case. In the instant case, the balance is in favour of a stay (see p 63G–H); *Salim bin Ismail & Ors v Lebbey Sdn Bhd (No 1)* [1997] 2 MLJ 1 and *Re Walter Su* [1987] 1 MLJ 44 followed. Since that sum had been deposited already with the assistant official assignee, it means even if a stay is refused, the sum under the allocatur would be settled and that the next proceeding under the bankruptcy petition would be or ought to be the JD's application for an order of discharge, such that all other proceedings, if any, to prosecute the bankruptcy petition would be idle, and would even be wholly unreasonable (see p 63I–64A). On the other hand, a refusal of a stay would foist upon the JD, notwithstanding his deposit of the sum under the allocatur, the disqualification and disability of a bankrupt, which repercussions could not be undone even if leave to appeal was obtained (see p 64A–B).

[**Bahasa Malaysia summary**

Pemghutang penghakiman telah memohon untuk menggantung semua prosiding di bawah petisyen kebangkrapan sehingga selesai usul penghutang penghakiman ('JD') memohon kebenaran untuk merayu kepada Mahkamah Persekutuan terhadap keseluruhan keputusan Mahkamah Rayuan.

Diputuskan, membenarkan permohonan tersebut:

(1) Di dalam membuat keputusan sama ada untuk memberikan satu penggantungan, mahkamah perlu mengimbangi akibatnya dan mahkamah perlu mengambilkira semua keadaan kes. Dalam kes ini, imbangan tersebut berpihak kepada satu penggantungan (lihat ms 63G–H); *Salim bin Ismail & Ors v Lebbey Sdn Bhd (No 1)* [1997] 2 MLJ 1 dan *Re Walter Su* [1987] 1 MLJ 44 diikut. Memandangkan jumlah tersebut telahpun didepositkan dengan

penolong pegawai pemegang harta, ini bermakna walaupun satu penggantungan ditolak, jumlah di bawah alokatur akan diselesaikan dan bahawa prosiding seterusnya di bawah petisyen kebangkrapan akan atau sepatutnya merupakan permohonan JD untuk satu perintah pelepasan, di mana semua prosiding lain, jika ada, untuk meneruskan petisyen kebankrapan adalah sia-sia, dan tidak munasabah sama sekali (lihat ms 63I–64A). Sebaliknya, satu penolakan untuk satu penggantungan akan membuat JD terpaksa menerima, walaupun beliau telah meletak deposit sejumlah wang di bawah alokatur, penyingkiran dan ketakupayaan seorang bangkrap, di mana akibatnya tidak boleh terungkai walaupun kebenaran untuk merayu telah diperolehi (lihat ms 64A–B).]

Notes

For cases on stay of bankruptcy petition, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) para 1904.

Cases referred to

Flatau, Re (1888) 22 QBD 83 (refd)
Low Kok Tuah, Re [1997] 4 CLJ 185 (refd)
Salim bin Ismail & Ors v Lebbey Sdn Bhd (No 1) [1997] 2 MLJ 1 (folld)
Teow Guan & Ors v Kian Joo Holdings Sdn Bhd & Ors [1995] 3 MLJ 598 (refd)
Walter Su, Re [1987] 1 MLJ 44 (folld)

Legislation referred to

Bankruptcy Act 1967 ss 6(4), 10, 97

Tan Beng Hong (*R Rajasingam* with him) (*Tan Beng Hong & Co*) for the appellant.

Toh Lee Hong (*Kek Boon Wei* with him) (*Kek Ooi & Lee Hong*) for the respondent.

Jeffrey Tan J. : This is the judgment debtor's application (encl 50 dated 31 May 1999) to stay all proceedings under the bankruptcy petition, until disposal of the judgment debtor's motion for leave to appeal to the Federal Court against the whole of the decision of the Court of Appeal.

On the background facts, on 26 April 1995, the learned senior assistant registrar made a receiving order of the protection of the estate of the judgment debtor ('the JD') and adjudged the JD a bankrupt, and on 1 August 1995, Vincent Ng J dismissed the JD's appeal to the judge in chambers against the receiving order and adjudication order. According to encl 51 (the affidavit of the JD dated 28 May 1999), and the following are not disputed by the judgment creditor ('the JC'), on 13 April 1999, the Court of Appeal dismissed the JD's appeal against the order dated 1 August

A 1995, and on 6 May 1999, the JD filed an application for leave to appeal to the Federal Court against the whole of the decision of the Court of Appeal.

It cannot be gainsaid that an appeal shall not operate as a stay of execution or of proceedings under the decision appealed from. Naturally, an application for leave to appeal, which is very much less than an appeal, B shall also not operate as a stay of execution or of proceedings under the decision to be appealed from (see *Re Low Kok Tuah* [1997] 4 CLJ 185, where Low Hop Bing J held 'that there has to be a proper and valid appeal pending in the court before an application for stay may be considered').

Nonetheless, with regard to bankruptcy proceedings, 'the court may at any time after the presentation of a bankruptcy petition stay any action, C execution or other legal process against the property or person of the debtor' (s 10 of the Bankruptcy Act 1967 ('the Act')) and, 'the court may at any time for sufficient reason, make an order staying the proceedings under a bankruptcy petition, either altogether or for a limited time, on such terms and subject to conditions as the court thinks fit' (s 97 of the Act). Although D it should be added, notwithstanding the provisions of s 6(4) of the Act, that when in a bankruptcy petition the act of bankruptcy relied on is the failure to comply with the bankruptcy notice to pay a judgment debt, the mere fact that an appeal is pending over the judgment is not a sufficient ground for staying the proceedings upon the petition (*Re Flatau* (1888) 22 QBD 83; *Re Walter Su* [1987] 1 MLJ 44).

E Predictably, in their respective affidavits, the JD contended that there were merits in his application for leave to appeal, whilst the JC contended that there were no prospects of success in the intended appeal. Mr Tan Beng Hong for the JD entreated that the stay sought was only until disposal of the leave application, whilst Miss Toh Lee Hong for the JC objected to a F stay. However, there was no dispute whatsoever that the JD has deposited the sum of RM209,565.51, which according to Mr Dharma for the assistant official assignee is more than enough to pay the JC in full and would be released to the JC upon the request of the JC, with the assistant official assignee.

The paramount consideration governing an application for a stay G whether of execution or of proceedings, or, in the case of an application for some other form of interim preservation of the subject matter of the appeal ... is that the appeal ... if successful, should not be rendered nugatory' (see *Teow Guan & Ors v Kian Joo Holdings Sdn Bhd & Ors* [1995] 3 MLJ 598 at p 610, per Gopal Sri Ram JCA). In deciding whether to grant a stay, the court has to balance the ... repercussions' (*Salim bin Ismail & Ors v Lebbey* H *Sdn Bhd (No 1)* [1997] 2 MLJ 1, per Mahadev Shankar JCA), the court has to have regard to all the circumstances of the case (*Re Walter Su* at p 45).

And in the instant case, the balance is in favour of a stay. The act of bankruptcy relied on is the failure to comply with the bankruptcy notice to pay the sum under allocatur dated 9 February 1994. But that sum has been I deposited since with the assistant official assignee. And since that sum has been deposited already with the assistant official assignee, it means even if a stay is refused, that the sum under the allocatur would be settled and that

the next proceeding under this bankruptcy petition would be or ought to be the JD's application for an order of discharge, such that all other proceedings, if any, to prosecute this bankruptcy petition would be idle, and would even be wholly unreasonable. On the other hand, a refusal of a stay would foist upon the JD, notwithstanding his deposit of the sum under the allocatur, the disqualification and disability of a bankrupt, which repercussions could not be undone even if leave to appeal was obtained. In the circumstances of the case, when the act of bankruptcy relied on is the failure to comply with the bankruptcy notice to pay the allocatur dated 9 February 1994, whereas the JD has deposited the sum under the allocatur dated 9 February 1994 for payment to the JC, whereas the JD is entitled to exhaust his rights, and whereas the JC is not unsecured, there is sufficient reason to grant the stay.

Accordingly, it is therefore ordered that all proceedings under the bankruptcy petition be stayed until disposal of the JD's application for leave to appeal to the Federal Court.

Application allowed, proceedings stayed.

Reported by Wong Ee Lynn